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2015 International Trade Decisions of the Federal Circuit

2015 INTERNATIONAL TRADE DECISIONS OF THE FEDERAL CIRCUIT

KEVIN J. FANDL*

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INTRODUCTION

In many ways, the 2015 term of the U.S. Court of Appeals for the Federal Circuit with respect to international trade felt like déjà vu. The Federal Circuit heard a number of significant cases this year that it addressed in one or more of the past several terms and either came back as an appeal on a related issue or for an en banc hearing.¹ Despite these lengthening cases, very few appeals have found success, especially with regard to overturning antidumping orders.

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1. See, e.g., Kevin J. Fandl, *2013 International Trade Law Decisions of the Federal Circuit*, 63 AM. U. L. REV. 1375, 1409–12 (2014) (discussing *Ford Motor Co. v. United States*, 715 F.3d 906 (Fed. Cir. 2013), which returned to the Federal Circuit in 2015); Kevin J. Fandl, *2010 International Trade Law Decisions of the Federal Circuit*, 60 AM. U. L. REV. 1121, 1124–27 (2011) (discussing *Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348 (Fed. Cir. 2010), which returned to the Federal Circuit in 2015).

As usual, most of the significant cases this year focused on dumping. Some familiar cases returned to the court with arguments over zeroing, which the U.S. Department of Commerce (Commerce) reversed after a negative World Trade Organization (WTO) ruling,² and three cases on the Byrd Amendment, which Congress repealed following a negative WTO ruling.³ Additionally, the Federal Circuit heard a number of interesting procedural cases this term, including one establishing value calculations in dumping cases involving non-market economies,⁴ the exhaustion of remedies requirement for seeking relief at the Court of International Trade (CIT),⁵ and the timing of responses to questionnaires.⁶ Also, several significant cases arose under section 337 of the Tariff Act of 1930, which permits the International Trade Commission (ITC) to investigate and potentially exclude goods that unfairly or unlawfully infringe upon a patent or copyright.

This Article is divided into four parts, each designating a specific category of cases. Part I focuses on the prominent number of antidumping and countervailing duty cases. Part II addresses classification cases, which are much more fact specific than other cases in front of the Federal Circuit. Part III discusses procedural cases, which may also overlap with the antidumping topic. Part IV addresses intellectual property cases under section 337. This Article focuses on the significant precedential cases, while excluding non-precedential and some narrow precedential cases. The Article briefly concludes by describing the Federal Circuit's pattern of deference to the ITC and Commerce.

I. ANTIDUMPING AND COUNTERVAILING DUTY CASES

Antidumping duties are fees that the United States imposes on "foreign merchandise . . . sold in the United States at less than its fair

2. *Diamond Sawblades Mfrs. Coal. v. United States*, 809 F.3d 626, 628 (Fed. Cir. 2015); *see infra* notes 195–215 and accompanying text.

3. *Schaeffler Grp. USA, Inc. v. United States*, 786 F.3d 1354, 1355 (Fed. Cir. 2015); *Pat Huval Rest. & Oyster Bar, Inc. v. Int'l Trade Comm'n*, 785 F.3d 638, 639 (Fed. Cir. 2015); *Giorgio Foods, Inc. v. United States*, 785 F.3d 595, 597 (Fed. Cir. 2015); *see infra* notes 83, 98 and accompanying text.

4. *JBF RAK LLC v. United States*, 790 F.3d 1358, 1362 (Fed. Cir. 2015); *see infra* note 35 and accompanying text.

5. *Int'l Custom Prods. v. United States*, 791 F.3d 1329, 1332 (Fed. Cir. 2015); *see infra* note 108 and accompanying text.

6. *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1346–47 (Fed. Cir. 2015); *see infra* note 162 and accompanying text.

value.”⁷ Countervailing duties are placed on goods that benefit from subsidies that foreign governments provide.⁸ Commerce investigates and determines whether foreign producers have sold or are likely to sell products or goods at less than fair value in the case of dumping or whether the government has provided a subsidy in the case of countervailing.⁹ The ITC continues the investigation by assessing whether the imported goods are causing or threatening to cause material injury to a domestic industry in the United States.¹⁰ “If both inquiries are answered in the affirmative, Commerce issues the relevant antidumping and countervailing duty orders.”¹¹

The antidumping or countervailing duty investigation process typically begins with a request filed by a domestic party. That initial petition will define the scope of the alleged dumping or subsidy, which will limit the extent of the investigation. Before the investigation begins, Commerce must ensure that the petition was filed on behalf of the relevant domestic industry.¹² Numerically, this means that the petition is supported by producers who “account for at least [twenty-five] percent of the total production of the domestic like product.”¹³

The first antidumping case of the 2015 term before the Federal Circuit addressed the scope of an antidumping order (“Order”) issued against Chinese manufacturers of certain aluminum extrusions.¹⁴ An investigation began into these extrusions in 2010 and concluded with an antidumping order issued on May 26, 2011.¹⁵ In October 2012, Walters & Wolf, Bagatelos Architectural Glass Systems, Inc., and Architectural Glass and Aluminum Company “submitted an amended scope request to Commerce pursuant to 19 C.F.R. § 351.225(c) (2012),” seeking to include curtain walls within

7. 19 U.S.C. § 1673(1) (2012).

8. *Id.* § 1671(a)(1).

9. *Id.* §§ 1671(a)(1), 1673(1).

10. *Id.* §§ 1671d(b)(1), 1673d(b)(1).

11. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002).

12. 19 U.S.C. § 1673a(c)(1)(A)(ii), (c)(2).

13. *Id.* § 1673a(c)(4)(A)(i).

14. *Shenyang Yuanda Aluminum Indus. Eng’g Co. v. United States*, 776 F.3d 1351, 1352–53 (Fed. Cir. 2015).

15. *See* Aluminum Extrusions from the People’s Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650 (May 26, 2011); Aluminum Extrusions from the People’s Republic of China: Countervailing Duty Order, 76 Fed. Reg. 30,653 (May 26, 2011).

the scope of the Order.¹⁶ The request sought to include the following categories of components in that Order:

(i) an aluminum extruded frame, which includes anchors, overlays, and other devices that attach the unit to the cement structure and adjoining units; (ii) infill material; and (iii) hardware to attach the curtain wall parts to the building, as well as to adjoining units, including fasteners, elastomeric lineal gaskets, anchor assemblies and components, clips, screws, nuts and bolts, steel embeds, splices to adjoin units, sealants used between the frames, infill material, and aluminum extrusion trim to physically attach the suspending curtain wall to the building structure.¹⁷

Yuanda challenged the amended scope request and Commerce reviewed the request, finding curtain wall units to be within the scope of the Order.¹⁸ Yuanda challenged the final scope order at the CIT and the CIT affirmed.¹⁹ The standard of review that the Federal Circuit and the CIT applied was whether Commerce's decision was "supported by substantial evidence and [wa]s otherwise in accordance with law."²⁰ In its discussion, the Federal Circuit emphasized the difficulty that parties have in overturning Commerce's decision, referring to the high degree of deference they are afforded.²¹

When conducting a scope order review, Commerce is bound by 19 C.F.R. section 351.225(k)(1) and (k)(2). These regulations require Commerce to assess the language of the original scope order, the items described in the petition, and prior determinations by Commerce and the ITC.²² In the event that this determination is not dispositive, Commerce moves on to an analysis of the Diversified Products Criteria.²³ Here, Commerce must assess whether the proposed items are within the scope of the order by evaluating five criteria: (1) "physical characteristics;" (2) "expectations of ultimate purchasers;" (3) "ultimate use;" (4) "channels of trade in which the product is sold;" and (5) manner of advertising and display.²⁴

16. *Shenyang Yuanda*, 776 F.3d at 1353.

17. *Id.*

18. *Id.*

19. *Id.* at 1352–53; *Shenyang Yuanda Aluminum Indus. Eng'g Co., v. United States*, 961 F. Supp. 2d 1291, 1294 (Ct. Int'l Trade 2014).

20. *Shenyang Yuanda*, 776 F.3d at 1354 (citing *Glob. Commodity Grp. LLC v. United States*, 709 F.3d 1134, 1138 (Fed. Cir. 2013)).

21. *Id.*

22. 19 C.F.R. § 351.225(k)(1) (2015).

23. *Id.* § 351.225(k)(2).

24. *Id.*

Yuanda argued that the aluminum extrusions that were discussed in the scope request appeared to be part of the scope of the original scope order, but only when imported as part of curtain wall units, not as separate items.²⁵ The Federal Circuit disagreed and found that the plain language of the order was clear and left no room for Yuanda's interpretation.²⁶ Additionally, Commerce relied on the test set forth in subsection (k)(1) in making its assessment, finding no need to look into the specific elements of the items in the expanded scope order.²⁷ The Federal Circuit found that decision appropriate and affirmed the holding of the CIT.²⁸

As part of the antidumping statute, affected parties are permitted to request a review by Commerce of an order issued against them.²⁹ This administrative review process may result in a modified order or the sustinment of the existing order. In *JBF RAK LLC v. United States*,³⁰ the order in question was a 2011 antidumping order on polyurethane terephthalate (PET) film from the United Arab Emirates.³¹ JBF immediately requested an administrative review of this order.³² Prior to Commerce's issuance of preliminary results in this investigation, another case was filed against JBF alleging "targeted dumping," which selects individual manufacturers whose merchandise differs significantly from that of other manufacturers and thus should not be compared for purposes of assessing the value of the alleged loss.³³ Commerce assigned JBF a targeted dumping margin of 9.80% and JBF appealed to the CIT.³⁴

The key issue in the *JBF* case was whether Commerce should have applied the "average-transaction" formula for determining the dumping margin rather than the more common "average-average"

25. *Shenyang Yuanda*, 776 F.3d at 1355–56.

26. *Id.* at 1357.

27. *Id.* at 1353–54.

28. *Id.* at 1359.

29. 19 U.S.C. § 1675(a)(1) (2012).

30. 790 F.3d 1358 (Fed. Cir. 2015).

31. *Id.* at 1360; Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review, 2010–2011, 78 Fed. Reg. 29,700 (May 21, 2013).

32. *JFB RAC LLC*, 790 F.3d at 1361; Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 76 Fed. Reg. 82,268 (Dec. 30, 2011).

33. *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1359 (Fed. Cir. 2010) (citing 19 U.S.C. § 1677f-1(d)(1)(B) (2012)).

34. Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review, 78 Fed. Reg. at 29,701.

formula.³⁵ These formulae emanate from federal regulations, which describe three methods for determining value:

(1) average-to-average: “a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise;” (2) transaction-to-transaction: “a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise;” and (3) average-to-transaction: “a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.”³⁶

In this instance, JBF argued that Commerce did not have the authority to apply these methodologies in an administrative review, but only in an investigation.³⁷ The statute discusses investigations but does not discuss administrative reviews, thereby leaving a gap in which a case like this falls.³⁸ In these cases, Commerce may use its discretion to fill those gaps so long as its approach is reasonable.³⁹ In *JBF*, the Federal Circuit concluded that the application of a targeted dumping methodology during the administrative review process was reasonable.⁴⁰

In *Downhole Pipe & Equipment, L.P., v. United States*,⁴¹ the Federal Circuit addressed whether Commerce can include goods in an investigation that are already being investigated under a different investigation.⁴² In the first iteration of this case in 2012, the CIT concluded and the Federal Circuit agreed that Commerce has statutory authority to determine which goods will be included in its investigation.⁴³ The good in question in this case is known as “green tube,” which is the element that results from the first step in the manufacture of a drilling tube.⁴⁴

35. *JBF RAK, LLC*, 790 F.3d at 1362.

36. *Id.* at 1364 (quoting 19 C.F.R. § 351.414(b)(1)–(3) (2015)).

37. *Id.* at 1362.

38. 19 U.S.C. § 1677f-1(d)(1)(B).

39. *JBF RAK LLC*, 790 F.3d at 1364 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

40. *Id.*

41. 776 F.3d 1369 (Fed. Cir. 2015).

42. *Id.* at 1375.

43. *Downhole Pipe & Equip., L.P. v. United States*, 887 F. Supp. 2d 1311, 1318–19 (Ct. Int’l Trade 2012).

44. *Downhole Pipe*, 776 F.3d at 1371.

To support its argument, Downhole Pipe contended that Commerce should reconsider whether there was sufficient industry support to initiate an investigation in the first place.⁴⁵ However, the Federal Circuit reiterated that this is not something that Commerce has the legal authority to do: “[a]fter [Commerce] makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered.”⁴⁶ The Federal Circuit concluded that Downhole Pipe’s argument failed on the basis of this statutory requirement.⁴⁷

In a similarly creative case later in 2015, Apex Exports sought to have its antidumping duties deducted from the calculation of its export price for purposes of calculating its dumping margin.⁴⁸ They first brought this claim to Commerce and the CIT in 2013, when it was initially denied.⁴⁹ The Ad Hoc Shrimp Trade Action Committee (“Ad Hoc”) appealed that decision to the Federal Circuit.⁵⁰

To determine the antidumping duty to be imposed on an exporter, Commerce applies the export price (EP) methodology, setting the EP as the first sale price to an unaffiliated, arms-length domestic buyer in the United States. Thereafter, Commerce determines the normal or fair value of the merchandise from the merchandise sales price in the exporter’s country. When Commerce identifies a normal or fair value greater than the EP and injury or threat of injury to U.S. industry, it applies an antidumping duty margin equivalent to the difference in assessed values.

Title 19 of the U.S. Code provides several allowances to more precisely calculate the value of the subject merchandise. Specifically, it says:

[t]he price used to establish export price . . . shall be . . . reduced by . . . the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.⁵¹

45. *Id.* at 1375–76.

46. *Id.* at 1374 (quoting 19 U.S.C. § 1673a(c)(4)(E) (2012)).

47. *Id.* at 1377. The Federal Circuit went on to discuss other factors that were not included here, ultimately upholding the finding of the CIT. *Id.* at 1381.

48. *Apex Exps. v. United States*, No. 11-00291, 2013 WL 6978901, at *1 (Ct. Int’l Trade Dec. 31, 2013).

49. *Id.* at *10.

50. *Apex Exps. v. United States*, 777 F.3d 1373, 1377 (Fed. Cir. 2015).

51. 19 U.S.C. § 1677a(c).

Among other things, the statute allows for the deduction of freight costs, U.S. customs duties, and port charges.⁵²

When calculating the dumping margin, Commerce will attempt to find comparable sales in the exporter's home market to compare to the unaffiliated buyer sales in the U.S. market, taking into account all associated costs in each of those markets.⁵³ In this case, Commerce did not find sufficient exporter market sales to calculate a proper normal value.⁵⁴ In such cases, Commerce will select a similar market in which the exporter has sufficient sales.⁵⁵ In the case of Apex, that market was the United Kingdom.⁵⁶

Apex sold its merchandise to buyers in the United Kingdom under cost and freight contracts, which required Apex only to land its goods at a designated port in the UK.⁵⁷ On the contrary, Apex's sales to buyers in the United States were delivery-duty-paid (DDP) contracts, whereby Apex served as both exporter and importer, including payment of customs fees upon arrival.⁵⁸ Ad Hoc argued that this difference in contract type should merit a different EP calculation.⁵⁹ Specifically, Ad Hoc argued Apex should deduct its dumping duty from its EP, in effect expanding the dumping margin and subsequent duty.⁶⁰

Whether antidumping duties should be included when calculating EP is an issue that has been raised before.⁶¹ In that case, the CIT found Title 19 to be ambiguous with respect to how "import duties" are defined.⁶² However, in *Apex*, Ad Hoc asked whether antidumping

52. *Id.*; Certain Frozen Warmwater Shrimp from India: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Preliminary No Shipment Determination, 76 Fed. Reg. 12,025, 12,028 (Mar. 4, 2011).

53. *Apex Exps.*, 777 F.3d at 1374–75.

54. *Id.* at 1375.

55. *Id.*

56. *Id.*

57. *Id.* at 1376.

58. *Id.*

59. *Id.* The Ad Hoc Shrimp Trade Action Committee was party to a second case in front of the Federal Circuit in 2015 in which they defended against a claim by Hilltop International seeking a separate dumping duty rate for imports of certain frozen warmwater shrimp. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1341–48 (Fed. Cir. 2015).

60. *Apex Exps.*, 777 F.3d at 1376.

61. *See Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359–61 (Fed. Cir. 2007) (finding that the statute describing import duties is ambiguous and allowing Commerce to exclude safeguard duties from its calculation); *see also* 19 U.S.C. § 1677a(c)(2) (2012) (establishing a formula to calculate export price ("EP") that does not expressly include instructions for the treatment of antidumping duties).

62. *Wheatland Tube*, 495 F.3d at 1359–60.

duties constitute “additional costs, charges, or expenses.”⁶³ The CIT again found the statute ambiguous and deferred to Commerce’s interpretation that such duties were excluded from the EP calculation.⁶⁴ On appeal, the Federal Circuit again reiterated the CIT determination that the statute is ambiguous and that Commerce is owed deference in its interpretation, and that its interpretation is not unreasonable.⁶⁵

Ambiguity was also at issue in a countervailing duty case focused on China in 2007 that continued into the 2015 Federal Circuit term. In *GPX International Tire Corp. v. United States*,⁶⁶ the Federal Circuit addressed whether Commerce may apply countervailing duties against non-market economy countries.⁶⁷ In the first iteration of this case, *GPX I*, the Federal Circuit determined that whereas Commerce may apply both antidumping and countervailing duties against market economy exporters, they may not levy countervailing duties against exporters from non-market economies because of the difficulty in determining the extent of government subsidies.⁶⁸ The Federal Circuit based its conclusion in *GPX* on the 1986 *Georgetown Steel Corp. v. United States* precedent.⁶⁹

In 2006, Commerce began to consider whether to apply countervailing duties on subject exports from China, a non-market economy.⁷⁰ The *Georgetown Steel* case mentioned above gave rise to the *Georgetown Memo*, issued by Commerce in 2007 to announce a new policy allowing countervailing duties to be assessed against Chinese

63. *Apex Exps.*, 777 F.3d at 1377.

64. *Apex Exps. v. United States*, No. 11-00291, 2013 WL 6978901, at *6 (Ct. Int’l Trade Dec. 31, 2013) (citing *Wheatland Tube*, 495 F.3d at 1359–60).

65. *Apex Exps.*, 777 F.3d at 1378, 1381.

66. *GPX IV*, 780 F.3d 1136 (Fed. Cir. 2015).

67. *Id.* at 1140; *see infra* note 167 (explaining non-market economies).

68. *GPX Int’l Tire Corp. v. United States (GPX I)*, 666 F.3d 732, 745 (Fed. Cir. 2011), *reh’g granted*, (*GPX II*), 678 F.3d 1308 (Fed. Cir. 2012), and *superseded by statute*, Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112–99, 126 Stat. 265, as *recognized in* *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194 (Fed. Cir. 2014).

69. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1314–18 (Fed. Cir. 1986) (holding that Commerce cannot levy countervailing duties against exporters from non-market countries because Congress did not intend for the countervailing duty law to apply in that situation, as evidence by the fact that Congress enacted alternative statutes to address the problem of exports from non-market countries).

70. *See* Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People’s Republic of China, Indonesia, and the Republic of Korea, 71 Fed. Reg. 68,546, 68,549 (Nov. 27, 2006) (noting that *Georgetown Steel* discretion is available to Commerce when deciding to investigate allegations of Chinese subsidies on certain paper products).

goods.⁷¹ This position was overruled in 2011 in the *GPX I* case, wherein the Federal Circuit held that congressional intent superseded Commerce's discretion as expounded in *Georgetown Steel*.⁷²

Three months later, Congress enacted new legislation overturning the *GPX I* decision and allowing Commerce to impose countervailing duties on non-market economy countries both retroactively and prospectively.⁷³ GPX challenged the new law and contended that it was unconstitutional because it violated the ex post facto clause, as well as the Fifth Amendment's due process and equal protection provisions.⁷⁴ The CIT disagreed and upheld the constitutionality of the statute, though it remanded application of countervailing duties against GPX back to Commerce for further factual determination.⁷⁵

With respect to the due process challenge in *GPX III*, the Federal Circuit found no violation under the new law.⁷⁶ It noted that, in assessing due process violations, "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively."⁷⁷ For the statute at issue in *GPX III*, the court found that it was "rationally related to legitimate government interests" and thus was upheld.⁷⁸

71. *E.g.*, *GPX I*, 666 F.3d at 735–36 (describing the rationale in the *Georgetown Memo* for treating China differently than "Soviet-style economies" to be that the differences in China's economy "enabled Commerce to calculate whether the government subsidized specific goods").

72. *See id.* at 745 (finding that by "amending and reenacting the trade laws in 1988 and 1994," Congress demonstrated its intent that countervailing duties should not be applied to non-market economy countries).

73. *See* Act of Mar. 13, 2012, Pub. L. No. 112-99, 126 Stat. 265 (2012) (codified at 19 U.S.C. §§ 1671(f), 1677f-1(f) (2012)) (stating that countervailing duties must be imposed on relevant goods from non-market economies unless subsidies cannot be identified or measured).

74. *GPX Int'l Tire Corp. v. United States (GPX III)*, 893 F. Supp. 2d 1296, 1305 (Ct. Int'l Trade 2013).

75. *Id.* at 1334. Note that while awaiting continuation of the appellate process in this case, the Federal Circuit decided another case challenging the ex post facto nature of the new law. *See* *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1196 (Fed. Cir. 2014) (finding that the law did not violate the ex post facto clause for the same reason as in *GPX III*—because it was remedial in nature rather than punitive).

76. *GPX III*, 893 F. Supp. 2d at 1311, 1316 (noting that GPX "failed to demonstrate that the government did not have a rational basis in enacting" the statute, or that the statute "upended a vested right").

77. *Id.* at 1311 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)).

78. *Id.* at 1334.

An antidumping duty can be beneficial to U.S. domestic producers in several ways. The most obvious benefit is protection against unfair imports by raising the cost of those imports to levels equivalent to the costs of the domestic producers.⁷⁹ But a second benefit was established by former Senator Robert Byrd with the passage of the “Byrd Amendment.” The Byrd Amendment—which was later found to be in violation of U.S. obligations at the WTO and subsequently repealed by Congress⁸⁰—incentivized the pursuit of antidumping actions by providing that antidumping duties collected by U.S. Customs and Border Protection (CBP) would be distributed directly to complaining petitioners in the United States.⁸¹

Decided in 2015, *Giorgio Foods, Inc. v. United States*⁸² concluded a long-standing dispute over whether Giorgio was eligible to receive payouts under the Byrd Amendment when it failed to expressly support the relevant antidumping petition.⁸³ In 1998, the ITC initiated an investigation into certain preserved mushrooms from Chile, India, Indonesia, and China.⁸⁴ Questionnaires were issued by the ITC to the domestic industry, including Giorgio, asking participants to indicate by checkbox whether they supported, opposed, or took no opinion on the petition.⁸⁵ Giorgio “did not check any of the boxes” but instead wrote, “[w]e take no position on Chile, China and Indonesia. We oppose the petition against India.”⁸⁶ Commerce then initiated an investigation, which concluded that dumping had occurred from those countries, leading to the establishment of antidumping duties.⁸⁷

79. See, e.g., *id.* at 1310 (explaining that antidumping remedies require “detailed calculations . . . to establish a duty rate that reasonably offsets the effects of foreign subsidies”).

80. See Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1003, 114 Stat. 1549, 1549A-73 (codified at 19 U.S.C. § 1675c(a)–(d) (2000)), repealed by Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 4, 154 (2006); Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, pt. I ¶ 2, pt. XI ¶ 1, WTO Doc. WT/DS217/AB/R (adopted Jan. 16, 2003) (concluding that the Byrd Amendment violated U.S. trade obligations under World Trade Organization (WTO) agreements).

81. Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1003, 114 Stat. 1549, 1549A-73.

82. 785 F.3d 595 (Fed. Cir. 2015).

83. *Id.* at 597–99.

84. *Id.* at 597.

85. *Id.*

86. *Id.*

87. *Id.* at 597–98.

While in effect, the Byrd Amendment required CBP to collect and distribute duties to “affected domestic producers.”⁸⁸ To qualify as such, an entity had to prove that it “was a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered.”⁸⁹ Giorgio petitioned the ITC to be included on the list of affected petitioners, but was denied based on a lack of support indicated on its questionnaire.⁹⁰

Giorgio initially brought suit in 2003, but its case was stayed pending the outcome of similar challenges.⁹¹ In particular, *SKF USA, Inc. v. U.S. Customs & Border Protection*⁹² held that the support requirement for eligible petitioners did not violate the First Amendment.⁹³ After resolution of *SKF USA*, Giorgio moved to amend its complaint in 2011 arguing that the ITC failed to recognize that Giorgio expressed its support in ways other than checking the box on the questionnaire—such as by providing confidential commercial information to petitions and contributing to the legal fees of the petitioners.⁹⁴ The CIT dismissed Giorgio’s motion to amend for “fail[ure] to state a claim in light of” the *SKF USA* case.⁹⁵

On appeal, the Federal Circuit reaffirmed its prior statements that “a producer who never indicates support for the petition by letter or through questionnaire response cannot be an affected domestic producer because a producer’s bare statement that it was a supporter is a necessary (though not a sufficient) condition to obtain affected

88. *Id.* at 598 (quoting 19 U.S.C. § 1675c(a) (2000) (repealed 2006)).

89. *Id.* (quoting 19 U.S.C. § 1675c(b)(1)(A) (2000) (repealed 2006)).

90. *Id.* at 599.

91. *See id.* (noting that the cases shared issues regarding First Amendment challenges to the Byrd Amendment).

92. 556 F.3d 1337 (Fed. Cir. 2009).

93. *Id.* at 1359–60; *see also Giorgio Foods, Inc.*, 785 F.3d at 599 (reasoning that the support requirement rewarded parties “who assist in trade law enforcement[,]” and therefore advanced a substantial government interest). Observe that two cases worthy of note were heard during the 2015 Federal Circuit term that used similar reasoning in relation to due process claims. Both *Schaeffler Group USA, Inc. v. United States* and *Pat Huval Restaurant & Oyster Bar, Inc. v. International Trade Commission* dismissed due process challenges to the Byrd Amendment’s retroactive application under a rational basis review. *See Schaeffler Grp. USA, Inc. v. United States*, 786 F.3d 1354, 1355–56 (Fed. Cir. 2015); *Pat Huval Rest. & Oyster Bar, Inc. v. Int’l Trade Comm’n*, 785 F.3d 638, 644, 647 (Fed. Cir. 2015).

94. *See Giorgio Foods, Inc.*, 785 F.3d at 599 (acknowledging that all of the support given was confidential, rather than public).

95. *Id.* The ITC also dismissed all of Giorgio’s claims. *Id.*

domestic producer status.”⁹⁶ The Federal Circuit found here that Giorgio failed to meet the statutory requirement set forth in 19 U.S.C. § 1675c(d)(1) because “indicating support by letter or through questionnaire response” was not enough.⁹⁷ Therefore, the company did not qualify for any distribution under the Byrd Amendment.⁹⁸

The liquidation process described in *Giorgio* is an important part of the legal process a party must go through when challenging an antidumping order. Once imports arrive at a port of entry, an importer or customs broker must file an entry form and, assuming there were no violations found upon inspection, the goods are released.⁹⁹ When the importer retrieves the goods, he or she must pay estimated duties on those entries “within [ten] working days.”¹⁰⁰ However, CBP retains the right to adjust the duties based upon reclassification of the goods for approximately 314 days following entry.¹⁰¹ If CBP fails to liquidate within one year of the entry, the goods are automatically liquidated,¹⁰² unless the time period is extended.¹⁰³ Liquidation is significant because it triggers the statutory period of 180 days in which an importer may challenge the final duty determination.¹⁰⁴ After that period, the duty determination is considered final. Once the recalculation is complete, the entries are “liquidated” and the importer is given 180 days to protest the liquidated amount.¹⁰⁵ After this protest period, the duties are considered final and cannot be challenged.¹⁰⁶

96. *Id.* at 601 (internal quotation marks omitted) (quoting *Ashley Furniture Indus., Inc. v. United States*, 734 F.3d 1306, 1311 (Fed. Cir. 2013)).

97. *See id.*

98. *See id.* at 602 (holding that neither opposition to a petition nor “the lack of a position” satisfies Byrd Amendment’s support requirement).

99. U.S. CUSTOMS & BORDER PROTECTION, IMPORTING INTO THE UNITED STATES: A GUIDE FOR COMMERCIAL IMPORTERS 11, 13 (2006) [hereinafter *GUIDE TO IMPORTING*], <http://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf>.

100. *Id.* at 13.

101. Letter from Dir., Office of Trade Compliance, to All Interested Parties (May 26, 1997), <http://apps.cbp.gov/csms/viewmssg.asp?Recid=15326&page=107> (notifying interested parties that “a 314 day no change liquidation cycle has replaced our [ninety] day no change liquidation cycle”).

102. 19 U.S.C. § 1504(a)(1)(A) (2012).

103. *Id.* at 1504(b).

104. 19 U.S.C. § 1514(c)(3).

105. *GUIDE TO IMPORTING*, *supra* note 99, at 82.

106. *Id.*

The question in *International Custom Products, Inc. v. United States*¹⁰⁷ was whether the protest process must be completed before the CIT can exercise jurisdiction over a challenge to assessed duties, and the constitutionality of the pre-payment requirement for filing a protest.¹⁰⁸ The first in a series of challenges brought by International Custom Products (“ICP”) was filed in 2005 after it suffered a liquidated tariff increase of 2400% on its imports of “white sauce.”¹⁰⁹ CBP failed to follow the required notice and comment process before re-classifying the sauce.¹¹⁰ However, rather than protest, ICP filed directly with the CIT invoking jurisdiction under § 1581(i), a section known as “residual jurisdiction.”¹¹¹

Residual jurisdiction might be applied where remedies under other sections of the statute are “manifestly inadequate.”¹¹² In the 2005 case and resulting appeal, the issue whether the consequences of reclassification when ICP was already on the “brink of bankruptcy” fell within that standard.¹¹³ The CIT upheld its jurisdiction and ultimately ruled that CBP violated “the notice and comment procedures of 19 U.S.C. § 1625(c).”¹¹⁴ The Federal Circuit reversed that decision in 2006, finding that “mere allegations of financial harm . . . do not make the remedy established by Congress manifestly inadequate.”¹¹⁵

ICP continued to fight the customs ruling that reclassified white sauce as dairy spreads and, in 2014, they were successful in having the ruling revoked.¹¹⁶ However, ICP was unable to avail itself of the relief provided for by the 2014 decision for thirteen protested entry

107. 791 F.3d 1329 (Fed. Cir. 2015), *petition for cert. filed*, No. 15-960 (Jan. 29, 2016).

108. *See id.* at 1335, 1338 (noting that the constitutional arguments underlie the statutory arguments as well, making their resolution key to deciding the case).

109. *See id.* at 1332–33.

110. *Id.* at 1333.

111. *Id.* at 1333. Section 1581(i) captures international trade cases that fall outside the jurisdictional elements of subsections (a)–(h). 28 U.S.C. § 1581(i) (2012).

112. *See Int’l Custom Prods., Inc.*, 791 F.3d at 1333 (referencing use of the “manifestly inadequate” standard by Court of International Trade (CIT) and Federal Circuit in the 2005 case).

113. *Id.*; *Int’l Custom Prods., Inc. v. United States*, 374 F. Supp. 2d 1311, 1321–22 (Ct. Int’l Trade 2005), *rev’d in part, vacated in part*, 467 F.3d 1324 (Fed. Cir. 2006) (finding that the financial considerations were sufficient to grant the court residual jurisdiction).

114. *Int’l Custom Prods., Inc.*, 791 F.3d at 1333.

115. *See id.* (rejecting the financial harm argument as an attempt to “circumvent” statutory requirements, and determining that ICP had to protest and pay the duty before it could invoke ITC jurisdiction).

116. *See id.*

liquidations because of procedural issues.¹¹⁷ CBP established liability for ICP of roughly \$28 million for those liquidated entries, which ICP did not pay before filing suit because it “remained on the ‘brink of bankruptcy.’”¹¹⁸ Those entries were at issue in the *ICP* case decided this term.¹¹⁹ The CIT was sympathetic to ICP’s as-applied constitutional challenge based on economic hardship, but ultimately upheld the pre-payment requirement.¹²⁰

At the Federal Circuit, the court addressed the constitutional validity of the pre-payment requirement found in the CIT’s jurisdictional statute.¹²¹ It concluded that the requirement is not a violation of the due process clause, but rather is a conditional waiver of the United States’ sovereign immunity.¹²² The same logic could be extracted from challenges related to taxation, which also require pre-payment of penalties before immunity will be waived.¹²³

Additionally, the Federal Circuit found that ICP had no legitimate due process claim because it had no property interest in a particular classification or duty rate.¹²⁴ It also found that engagement in international trade was not a substantive due process right.¹²⁵ Finally, the Federal Circuit concluded, yet again, that the CIT cannot acquire jurisdiction over a challenge to duties levied without first filing a

117. *See id.* at 1333–34 (relating details of the procedural history that precluded those thirteen entries from having their protest suspended, and therefore becoming final prior to resolution of the 2014 case).

118. *Id.* at 1334.

119. *Id.*

120. *See id.* (explaining that the CIT “recognized that the pre-payment requirement ‘seemed both harsh and unfair when applied [to ICP],’” but also noted “that the pre-payment requirement ‘ha[d] been a fixture of the customs laws’ since 1845” (quoting *Int’l Custom Prods., Inc. v. United States*, 931 F. Supp. 2d 1338, 1343–44 (Ct. Int’l Trade 2013))).

121. *See id.* at 1335 (stating that 28 U.S.C. § 2637(a) (2012) serves as the statutory basis for the pre-payment requirement).

122. *See id.* (explaining that the government can only be sued under circumstances where it has expressly waived its sovereign immunity).

123. *See id.* at 1336 (discussing cases upholding a requirement to prepay taxes before being able to file a refund suit); *see also, e.g., United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 11 (2008) (holding that a taxpayer must pay his or her taxes *before* bringing an action for refund).

124. *Int’l Customs Prods., Inc.*, 791 F.3d at 1337.

125. *See id.* (noting that engaging in foreign commerce is not a “fundamental right,” and therefore not a “protectable interest” (quoting *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998); *Am. Ass’n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985))).

protest and then seeking jurisdiction under § 1581(a).¹²⁶ Without payment of the duties, no protest can be filed, and without a protest being filed, no challenge at the CIT can commence.

II. CLASSIFICATION CASES

Duty rates on imported goods are determined by, among other things, the classification of those goods by CBP upon importation.¹²⁷ Classification is the process of identifying where in the U.S. Harmonized Tariff Schedule (USHTS) a particular good falls.¹²⁸ The classification process is essential for importers because it will establish the designation within the schedule for that good, which is directly linked to the applicable tariff.¹²⁹ In many cases, such as the first one in our analysis, components of goods will be classified in a manner that leads to residual effects upon finished goods—leading component manufacturers in some instances to challenge a lower tariff rate associated with a classification that affects its end-use customers.

In *Best Key Textiles v. United States*,¹³⁰ a manufacturer of yarns made with “polyester chips and metal nanopowders” and garments appealed a series of pre-importation classification rulings regarding its yarns and a garment called the “Johnny Collar” pullover.¹³¹ The yarn was initially classified as “metalized yarn” by New York customs, but was reclassified to “polyester yarn” after reconsideration by CBP Headquarters.¹³² Similarly, the Johnny Collar pullover was first classified “as a pullover of man-made non-metalized fibers,” but upon review was reclassified under the subheading for “men’s shirts made of polyester.”¹³³

During the initial review, Best Key sought to have the Johnny Collar pullover classified under HTSUS 6105.90.8030, which included men’s shirts made with “other textile materials” and which carried a duty rate of 5.6% ad valorem.¹³⁴ New York Customs conducted a laboratory analysis of the pullovers and found only “trace amounts of

126. See *id.* at 1339 (noting concern that finding otherwise would allow “artful pleading” to circumvent Congress’s statutory scheme).

127. GUIDE TO IMPORTING, *supra* note 99, at 81.

128. *Id.*

129. See *id.* at 82 (describing potential consequences resulting from incorrect classification).

130. 777 F.3d 1356 (Fed. Cir. 2015).

131. *Id.* at 1358.

132. See *id.* at 1358–59 (noting that the metalized yarn classification had a 13.2% duty, while the polyester yarn classification had only an 8% duty rate).

133. See *id.* (resulting in a duty rate of thirty-two percent).

134. *Id.* at 1358.

metal” in the fabric.¹³⁵ Customs thus classified the pullovers under heading HTSUS 6110.30.3053, for pullovers “of man-made non-metalized fibers,” based on the lab results and a “label that stated ‘100% polyester.’”¹³⁶ This heading carries a duty rate of thirty-two percent ad valorem.¹³⁷ Best Key sought a reconsideration of the “Johnny Collar” ruling.¹³⁸

CBP Headquarters reviewed the Yarn and “Johnny Collar” rulings and, in 2013, “published notices of proposed revocation of both rulings.”¹³⁹ CBP Headquarters reclassified Best Key’s yarn as polyester yarn under HTSUS 5402.47.90 after receiving two comments in response to its notice.¹⁴⁰ As a result of the yarn reclassification, CBP Headquarters also revoked the “Johnny Collar” ruling, but maintained the classification of the pullovers as polyester under HTSUS 6110.30.30.¹⁴¹

Best Key challenged the Yarn Ruling Revocation before the CIT, but did not challenge the Johnny Collar Revocation.¹⁴² Even though Best Key received a lower duty rate on its yarn through the revocation issued by CBP Headquarters, it contended that the Yarn Ruling Revocation caused them a loss of business in relation to the Johnny Collar Revocation.¹⁴³ The CIT sustained the revocation ruling and Best Key appealed to the Federal Circuit.¹⁴⁴

On appeal, the principal issue raised was whether the CIT had jurisdiction to hear Best Key’s challenge at all because Best Key does

135. *Id.*

136. *See id.* (alternately referencing the subsection as being “for men’s shirts made of polyester”).

137. *Id.*

138. *Id.*

139. *Id.* at 1358–59; *see* Proposed Revocation of Ruling Letter & Proposed Revocation of Treatment Relating to the Tariff Classification of a “Johnny Collar” Pullover Garment, 47-18 Cust. B. & Dec. 26, 28 (Apr. 24, 2013); Proposed Revocation of Ruling Letter & Proposed Revocation of Treatment Relating to the Tariff Classification of a Polyester Monofilament Yarn, 47-18 Cust. B. & Dec. 33, 35 (Apr. 24, 2013).

140. *Best Key Textiles Co.*, 777 F.3d at 1359; *see* Customs Headquarters Ruling HQ H202560, 2013 WL 7891683 (Sept. 17, 2013); Revocation of Ruling Letter & Revocation of Treatment Relating to the Tariff Classification of a Polyester Monofilament Yarn, 47-41 Cust. B. & Dec. 20, 22 (Oct. 2, 2013).

141. *Best Key Textiles Co.*, 777 F.3d at 1359; *see* Revocation of Ruling Letter & Revocation of Treatment Relating to the Tariff Classification of a “Johnny Collar” Pullover Garment, 47-41 Cust. B. & Dec. 15, 17 (Oct. 2, 2013).

142. *Best Key Textiles Co.*, 777 F.3d at 1359.

143. *Id.* at 1362.

144. *Id.* at 1359.

not directly import its products, but rather sells the yarn to producers who import finished garments made of the yarn.¹⁴⁵ In essence, the CIT decided that Best Key was raising a defense on behalf of its customers rather than for itself.¹⁴⁶ The Federal Circuit determined that the CIT has:

exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.¹⁴⁷

The jurisdiction granted to the CIT under § 1581, as noted above, requires some type of injury in order to sustain an action. The Federal Circuit held that because Best Key was not suffering an injury because it was not exporting its yarn, it could not sustain an action at the CIT.¹⁴⁸ The proper procedure would be for Best Key's customers to import their textiles to the United States and, following liquidation, protest the classification of their goods.¹⁴⁹ The Federal Circuit thus determined there was not proper jurisdiction in the case, and it reversed and vacated the CIT holding.¹⁵⁰

At the other end of the classification spectrum are claims against importers for damages due to misclassification. In *United States v. Nitek Electronics, Inc.*,¹⁵¹ the importer entered gas meter swivels and nuts used in pipe fitting.¹⁵² CBP claimed that the entries were misclassified and issued a notice that the importer would be charged additional duties, with tentative culpability placed on the importer due to gross negligence.¹⁵³

145. *Id.* at 1361–62.

146. *Id.* at 1361.

147. *Id.* at 1359–60 (quoting 28 U.S.C. § 1581(h) (2012)).

148. *See id.* at 1363 (noting further that to allow a cause of action to benefit customers rather than the petitioner itself would create “a new cause of action under § 1581(i),” which is prohibited).

149. *Id.* at 1362–63.

150. *Id.* at 1363.

151. 806 F.3d 1376 (Fed. Cir. 2015).

152. *Id.* at 1377.

153. *See id.* (noting that CBP asserted that Nitek had submitted “material[ly] false statements and documents”).

The case was referred to the U.S. Department of Justice to pursue the penalty claim in accordance with 28 U.S.C. § 1582.¹⁵⁴ However, the United States pursued the claim under a standard of negligence rather than gross negligence.¹⁵⁵ The CIT dismissed the penalty claim for negligence because it was under a different standard than what had been referred to by CBP and thus “the [g]overnment had failed to exhaust all administrative remedies.”¹⁵⁶ In upholding the CIT’s reasoning, the Federal Circuit explained that “[t]he pre-penalty notice must ‘specify all laws and regulations allegedly violated’ and ‘state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence.’”¹⁵⁷ Further, § 1592(e) allows the United States to bring a claim to collect penalties established by CBP.¹⁵⁸ And because fraud, negligence, and gross negligence differ, the United States’ attempt to change the cause of action in effect created a new penalty.¹⁵⁹ The Federal Circuit therefore agreed with the CIT that only penalties issued by CBP can be sought by the United States under § 1592(e).¹⁶⁰

III. PROCEDURAL CASES

The rules of procedure for international trade cases, as discussed above with respect to antidumping and countervailing investigations, are rigid. And though Commerce possesses discretionary authority in certain cases to waive strict enforcement of some procedural provisions, a petitioner would be wise not to abuse this discretion.¹⁶¹ This was the case for Dongtai Peak Honey Industry Company (“Dongtai”).¹⁶²

154. *See id.* at 1378 (recognizing that Nitek opposed the claim of gross negligence and asserted that “it had not acted with wanton disregard for the law”).

155. *Id.*

156. *See id.* at 1378 (indicating that the CIT found that “the Government had failed to exhaust all administrative remedies by not having [CBP] demand a penalty based on negligence”).

157. *Id.* at 1379 (quoting 19 U.S.C. § 1592(b)(1)(A)(iii), (v) (2012)).

158. *Id.*

159. *See id.* at 1379–80 (describing the burden of proof associated with each “level of culpability”).

160. *See id.* at 1382.

161. “Absent constitutional constraints or extremely compelling circumstances[,] ‘the administrative agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”’” *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)).

162. *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1346 (Fed. Cir. 2015).

Commerce issued an antidumping duty order on honey imported from China in 2001.¹⁶³ As part of its annual administrative review process, Commerce named Dongtai as one of the subject producers under the order for the period December 1, 2010 through November 30, 2011.¹⁶⁴ During its administrative review process, Commerce typically solicits information from respondents under the relevant order about their exports and costs, among other things.¹⁶⁵ This is done in the form of questionnaires issued directly to the respondents with deadlines by which those respondents must reply.¹⁶⁶

During its 2012 review cycle, Commerce issued a questionnaire to Dongtai soliciting information about its non-market economy¹⁶⁷ sales.¹⁶⁸ The deadline for Dongtai to respond to certain sections of this questionnaire was April 8, 2012.¹⁶⁹ Six minutes prior to the submission deadline, Dongtai submitted a request for a time extension.¹⁷⁰ Commerce granted this request, noting in its letter that, “[t]o ensure that [Commerce] is fully able to consider requests of this nature, we advise Dongtai Peak to plan accordingly and file any future extension requests as soon as it suspects additional time may be necessary.”¹⁷¹

Subsequently, Dongtai failed to meet the deadline to respond to a separate section of the questionnaire.¹⁷² Dongtai filed a request for extension two days after the deadline, claiming a variety of justifications for the late response, including a Chinese holiday and

163. Honey from the People's Republic of China, 66 Fed. Reg. 63,670 (Dec. 10, 2001).

164. Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 77 Fed. Reg. 4759 (Jan. 31, 2012).

165. U.S. INT'L TRADE COMMISSION, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK II-7 to II-8 (14th ed. 2015), https://www.usitc.gov/trade_remedy/documents/handbook.pdf.

166. *Dongtai Peak*, 777 F.3d at 1346.

167. “A ‘nonmarket economy country’ is ‘any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.’” *Dongtai Peak*, 777 F.3d at 1350 n.1 (quoting 19 U.S.C. § 1677(18)(A) (2012)). Commerce considers China be a non-market economy and because of this, it “generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise.” *Id.* (quoting *Shanghai Foreign Trade Enters. Co. v. United States*, 318 F. Supp. 2d 1339, 1341 (Ct. Int'l Trade 2004)).

168. *See id.* at 1346.

169. *Id.*

170. *Id.*

171. *Id.* at 1346–47.

172. *Id.* at 1347.

trouble with the translation.¹⁷³ The Honey Producers Association petitioned Commerce to deny the extension request, and Dongtai reiterated its justification to grant the request.¹⁷⁴ Noting that it had already placed Dongtai on notice that late requests would not be considered, Commerce denied Dongtai's request.¹⁷⁵ Dongtai petitioned for reconsideration, but Commerce rejected its request and ultimately removed its untimely questionnaire responses from the record.¹⁷⁶

Accordingly, because the record lacked sufficient data to grant Dongtai a separate rate apart of the Order, Dongtai was subjected to the full duty.¹⁷⁷ On November 26, 2012, Commerce issued its "*Final Results*," affirming the entirety of its "*Preliminary Results*."¹⁷⁸ Dongtai challenged this decision at the CIT in 2014, and, following the denial of its challenge in 2014, Dongtai appealed to the Federal Circuit.¹⁷⁹

As noted at the outset of this Part, Commerce has some procedural discretion in considering requests by parties subject to antidumping or countervailing duty orders. With respect to timely responses to requests for information, Commerce maintains discretion to extend the time allotted for filing such responses.¹⁸⁰ However, Commerce also maintains the authority to seek strict compliance with its deadlines.¹⁸¹ The court will generally defer to the discretion of the agency in making these determinations.¹⁸² In this case, the Federal Circuit found that Dongtai was given additional time to file its response once, and that Commerce was acting within its authority when denying the second such request.¹⁸³

In another case arising out of imports from China and Vietnam in this instance, a procedural question arose with respect to counting votes among commissioners of the ITC. As discussed above, the ITC

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (citing Honey From the People's Republic of China, 77 Fed. Reg. 46,699, 46,701-02 (Aug. 6, 2012)).

178. *Id.* at 1348.

179. *Id.*; *Dongtai Peak Honey Indus. Co. v. United States*, 971 F. Supp. 2d 1234, 1245 (Ct. Int'l Trade 2014).

180. 19 C.F.R. § 351.302(b) (2015).

181. "In order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations." *Yantai Timken Co. v. United States*, 521 F. Supp. 2d 1356, 1371 (Ct. Int'l Trade 2007).

182. *Dongtai Peak*, 777 F.3d at 1351.

183. *Id.* at 1350-51.

is responsible for determining injury or threat of injury to domestic industry.¹⁸⁴ The ITC consists of six commissioners who vote in these determinations.¹⁸⁵ A majority vote prevails and, in the case of a tie, an affirmative determination results.¹⁸⁶

*Siemens Energy, Inc. v. United States*¹⁸⁷ addresses the unique issue of an evenly divided vote amongst the ITC commissioners where two found material injury, one found threat of material injury, and three found neither type of injury.¹⁸⁸ The ITC concluded that an evenly divided vote, regardless of whether it was for threat or actual injury, still results in an affirmative determination.¹⁸⁹ The CIT upheld this decision¹⁹⁰ and, following the same procedure, the Federal Circuit determined whether the ITC's decision was "unsupported by substantial evidence on the record, or otherwise not in accordance with law."¹⁹¹

For purposes of assessing whether the ITC decision was based upon substantial evidence, the Federal Circuit looks to the relevant statute, which states:

For the purpose of applying this paragraph when the issue before the Commission is to determine whether there is—(A) material injury to an industry in the United States, (B) threat of material injury to such an industry, or (C) material retardation of the establishment of an industry in the United States, by reason of imports of the merchandise, an affirmative vote on any of the issues shall be treated as a vote that the determination should be affirmative.¹⁹²

Given that the statute appears to consider the possibility that commissioners may not all vote for the same type of affirmative finding, the Federal Circuit determined that it was reasonable for the ITC to interpret such a vote as within the automatic affirmation of

184. 19 U.S.C. § 1677(11) (2012).

185. *Id.* § 1330(a); *see, e.g.*, *MBL (USA) Corp. v. United States*, 787 F. Supp. 202, 205–08 (Ct. Int'l Trade 1992) (explaining the procedure when the voting commissioners are evenly divided and where there is no majority result).

186. 19 U.S.C. § 1677(11).

187. 806 F.3d 1367 (Fed. Cir. 2015).

188. *Id.* at 1369.

189. *See Siemens Energy, Inc. v. United States*, 992 F. Supp. 2d 1315, 1322 (Ct. Int'l Trade 2014), *aff'd*, 806 F.3d 1367 (Fed. Cir. 2015) (describing the process the ITC used to reach its final determination that domestic industry would be harmed by the importation of Chinese wind towers).

190. *Id.* at 1345.

191. *Siemens Energy, Inc.*, 806 F.3d at 1369 (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)) (internal quotation marks omitted).

192. 19 U.S.C. § 1677(11).

the statute.¹⁹³ In addition, because Commerce only levied prospective duties against the importer, which typically occurs when only threat of material injury is found, the Federal Circuit concluded that its actions were reasonable.¹⁹⁴

The clarification of rules governing the investigation of dumping cases continued in *Diamond Sawblades Manufacturer's Coalition v. Hyosung D & P Co.*¹⁹⁵ *Diamond Sawblades* addressed the former practice of “zeroing.”¹⁹⁶ In a dumping investigation that found a subject manufacturer’s sales above fair market value, the Commission would treat those sales as zero, thereby providing no offset to sales made at less than fair value.¹⁹⁷ In effect, this makes it much more likely that Commerce can sustain a claim of dumping.¹⁹⁸ In 2005, the European Communities challenged the practice of zeroing at the WTO.¹⁹⁹ The WTO determined that the United States and its zeroing practice violated the country’s obligations under the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.²⁰⁰

Due to the WTO decision, Commerce proposed a change to its dumping investigation policy by eliminating the practice of zeroing.²⁰¹ In the proposed rule, Commerce stated that the new policy would take effect upon publication of the final rule.²⁰² When Commerce promulgated the final rule on December 27, 2006, it stated that the new rule would only apply to pending and future cases

193. *Siemens Energy, Inc.*, 806 F.3d at 1369 (“The ITC statute thus foresaw possible factual variations, and Congress established that a tie vote produces an affirmative determination of injury.”).

194. *Id.* at 1372–73.

195. 809 F.3d 626 (Fed. Cir. 2015).

196. *Id.* at 628.

197. *Id.*

198. *Id.*

199. *Advanced Tech. & Materials Co. v. United States*, 33 I.T.R.D. 1874 (Ct. Int’l Trade 2011).

200. *Id.*; Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11,189 (Mar. 6, 2006).

201. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. at 11,189.

202. *Id.*

as of the effective date, which was January 16, 2007.²⁰³ Later, Commerce changed the effective date to February 22, 2007.²⁰⁴

In June 2005, several Chinese and Korean exporters of diamond sawblades came under investigation for dumping based upon allegations by Diamond Sawblades Manufacturers.²⁰⁵ In that investigation, the ITC found no material injury and thus dismissed the petition.²⁰⁶ In July 2006, the same petitioner appealed that decision to the CIT, which remanded the case to the ITC for reconsideration in February 2008, long after the new Commerce policy on zeroing had taken effect.²⁰⁷ The ITC, applying the then defunct zeroing policy, found threatened material injury and issued an antidumping order, which the CIT and Federal Circuit affirmed.²⁰⁸

The question in this case was whether Commerce was ambiguous enough in its effective date for the new no-zeroing policy to allow a reasonable interpretation of the ambiguity to cover this investigation at the time the investigation initially concluded.²⁰⁹ The court found that the new rule was ambiguous and appeared to take effect only in February 2007.²¹⁰ It also concluded that Commerce finished the investigation of this dumping action in May 2006.²¹¹ Consequentially, the court held that the conclusion that the case was ongoing at the time the new rule took effect was reasonable.²¹² When the CIT remanded the case to the ITC, the ITC had only ministerial duties to perform in making its determination.²¹³ As such, there would be no reason to apply a new policy to an already completed investigation.²¹⁴ The Federal Circuit upheld the CIT finding that application of the no-zeroing policy was not required in this case.²¹⁵

203. *Diamond Sawblades Mfrs. Coal. v. United States*, 809 F.3d 626, 628 (Fed. Cir. 2015).

204. *Id.* at 628–29; Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 Fed. Reg. 3783 (Jan. 26, 2007).

205. Initiation of Antidumping Duty Investigations: Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea, 70 Fed. Reg. 35,625 (June 21, 2005).

206. *Diamond Sawblades*, 809 F.3d at 629 (citing *Diamond Sawblades and Parts Thereof From China and Korea*, 71 Fed. Reg. 39,128 (July 11, 2006)).

207. *Id.*

208. *Id.*

209. *Id.* at 630.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *See id.*

215. *Id.* at 630–31.

IV. INTELLECTUAL PROPERTY CASES

Section 337 of the 1930 Tariff Act exists to prevent the unfair or unlawful importation of goods into the United States.²¹⁶ While the Act prevents a variety of unfair or unlawful imports, section 337(a)(1)(B) focuses on goods that would infringe a valid patent or copyright.²¹⁷ Based on the statute, it is less clear whether importing a good that does not infringe upon a patent but yet is used in a way that does infringe upon a patent only through the inducement of the seller of that good would similarly violate the Act. That was the issue in the 2013 case *Suprema, Inc. v. International Trade Commission*,²¹⁸ in which the Federal Circuit overturned an ITC decision which found that the inducement of infringement constituted infringement for purposes of the Tariff Act.²¹⁹ In a rehearing en banc, the Federal Circuit reversed its 2013 decision, opining that the statute was sufficiently vague and according *Chevron* deference to the ITC's decision.²²⁰

Section 337 of the Tariff Act authorizes the ITC to investigate unfair trade practices in the importation of a good that violates a patent.²²¹ If the ITC concludes that the intended import would infringe upon a patent, the ITC will issue an exclusion order preventing the importation.²²² In this case, *Suprema* and another company, *Mentalix*, sought to import fingerprint scanning devices to the United States that *Suprema* manufactured abroad.²²³ *Cross Match Technologies Incorporated* ("Cross-Match") filed a complaint with the ITC alleging that the devices violated a patent that they held for the method of capturing and processing fingerprints and should be barred from importation.²²⁴

Suprema is unique because the machines manufactured by *Suprema* do not appear to directly infringe upon the patent as they are sold without software and thus without the ability to capture or process

216. 19 U.S.C. § 1337 (2012).

217. *Id.* § 1337(a)(1)(B)(i).

218. 742 F.3d 1350 (Fed. Cir. 2013), *reh'g en banc*, 796 F.3d 1338 (2015).

219. *Id.* at 1352, 1357.

220. *Suprema, Inc. v. Int'l Trade Comm'n (Suprema II)*, 796 F.3d 1338, 1340 (Fed. Cir.) (en banc) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)), *reh'g en banc*, 626 F. App'x 273 (Fed. Cir. 2015).

221. 19 U.S.C. § 1337(b)(1).

222. *Id.* § 1337(d).

223. *Suprema II*, 796 F.3d at 1341.

224. *Id.*

fingerprints.²²⁵ The machines come with a software development kit that allows other companies to develop custom software, without which the machines will not function.²²⁶ In this instance, Mentalix, an American company, develops and integrates that software with the machine after importation.²²⁷ At that point, i.e., after importation, the combined machine and software allegedly infringe upon Cross-Match's patent.²²⁸

The Tariff Act defines the unlawful importation, sale for importation, or sale within the United States after importation of articles that violate a valid patent.²²⁹ An administrative law judge found that the Suprema scanners, when combined with the American-designed software, infringed Cross-Match's patent and therefore should be excluded from importation under the Act.²³⁰ Upon review, the ITC "found that Suprema 'willfully blinded' itself to the infringing nature of Mentalix's activities,' which Suprema 'had actively encouraged.'"²³¹

A majority of the en banc court agreed that the required application of software would, when combined with the imported machines, infringe upon a valid patent, permitting the ITC to issue an exclusionary order on the machines.²³²

Two judges dissented from the majority opinion. Judge O'Malley and Judge Dyk dissented separately, arguing that Suprema did not directly induce an infringement upon Cross-Match's patent.²³³ Therefore, the dissenting judges argued that the court should not permit the exclusionary order as the machines alone were not unlawfully imported.²³⁴

In another major section 337 case this year, Align Technology filed an investigation against ClearCorrect Operating, LLC, alleging that

225. *Id.* at 1341–42.

226. *Id.*

227. *Id.* at 1342.

228. *Id.*

229. 19 U.S.C. § 1337(a)(1)(B)(i) (2012).

230. *Suprema II*, 796 F.3d at 1342.

231. *Id.* at 1343 (quoting Certain Biometric Scanning Devices, Inv. No. 337-TA-720, USITC Pub. 4366 (Fed. 2013) (Final), Comm'n Op. at 12).

232. *Id.* at 1349.

233. *Id.* at 1353–54 (Dyk, J., dissenting); *id.* at 1354, 1369 (O'Malley, J., dissenting).

234. *Id.* at 1353–54 (Dyk, J., dissenting); *id.* at 1354, 1369 (O'Malley, J., dissenting).

its imports violated seven of the former company's patents.²³⁵ The case involved aligners used in dentistry to straighten a patient's teeth.²³⁶ ClearCorrect U.S. produces these aligners with the help of ClearCorrect Pakistan, which is responsible for digitally designing them for production in the United States.²³⁷ ClearCorrect Pakistan creates digital models that are then transmitted to ClearCorrect U.S.²³⁸ Align Technology alleged that these digital transmissions infringed upon its patents.²³⁹

The ITC concluded that ClearCorrect violated the Align Technology patents but that, because the violation occurred wholly within the United States, it would not sustain a section 337 proceeding.²⁴⁰ The ITC also found that ClearCorrect Pakistan contributed to that infringement and thus that they could be included in an exclusion order.²⁴¹ ClearCorrect appealed that decision.²⁴²

The Federal Circuit emphasized that section 337 is a statute that focuses on the facilitation of fair trade practices and that trade referred to material goods.²⁴³ Congress enacted section 337 to "curb[] unfair trade practices" by authorizing the ITC and CBP to exclude the importation of goods into the U.S. market that contribute to unfair trade practices.²⁴⁴ The jurisdiction of the ITC extends only to "articles" of trade, as defined in 19 U.S.C. § 1337(a).²⁴⁵ If there is no article in dispute, there can be no unfair trade, according to the Federal Circuit.²⁴⁶ "Here, the only purported 'article' found to have been imported was digital data that was transferred electronically, i.e., not digital data on a physical medium such as a compact disk or thumb drive."²⁴⁷ Therefore, data lacking a physical medium component raises the question whether the term "article" encompasses electronically transferred data.

235. ClearCorrect Operating, LLC v. Int'l Trade Comm'n, 810 F.3d 1283, 1287 (Fed. Cir. 2015).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1289.

241. *Id.*

242. *Id.*

243. *Id.* at 1289–90.

244. *Id.* at 1289 (quoting *Suprema II*, 796 F.3d 1338, 1345 (Fed. Cir.) (en banc), *reh'g en banc*, 626 F. App'x 273 (Fed. Cir. 2015)).

245. *Id.* at 1289–90 (citing 19 U.S.C. § 1337(a) (2012)).

246. *Id.* at 1290.

247. *Id.*

Applying *Chevron* deference to the ITC decision here, the Federal Circuit concluded that the statute does not define the term “article” and thus the ITC was empowered to apply the ordinary or natural meaning of the word.²⁴⁸ The ITC concluded that article should be defined as “embrac[ing] a generic meaning that is synonymous with a particular item or thing, such as a unit of merchandise.”²⁴⁹ It concluded that this meant any consumer goods traded in commerce, including digital goods; the Federal Circuit disagreed.²⁵⁰

The Federal Circuit surveyed various dictionary definitions of “article” during the time of the 1922 Tariff Act and found that “article” would clearly exclude digital goods.²⁵¹ The Federal Circuit concluded that “[t]he aforementioned dictionaries make clear that the ordinary meaning of the term ‘articles’ is ‘material things.’”²⁵² The Federal Circuit clarified that the question is not whether there are alternative definitions available.²⁵³ Accordingly, the Federal Circuit determined that because digital transmissions are not considered goods, they cannot be used to grant jurisdiction under section 337.²⁵⁴ The Federal Circuit reversed and remanded the decision to the ITC.²⁵⁵

In a final significant section 337 case from the 2015 term, the Federal Circuit addressed the domestic injury requirement of the statute,²⁵⁶ which requires that a claimant show “‘with respect to the articles protected by patent,’ that there is: (A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in its exploitation, including engineering, research and development, or licensing.”²⁵⁷

Although the ITC argued in *Lelo, Inc. v. International Trade Commission*²⁵⁸ that it occasionally applies a qualitative analysis, the ITC has

248. *See id.* at 1290–91 (citing *Fed. Deposit Ins. Co. v. Meyer*, 510 U.S. 471, 476 (1994)) (analyzing the legislative history of the Tariff Act and consulting relevant dictionaries to determine that “articles” cannot include digital goods).

249. *Id.* at 1291 (quoting *Certain Digital Models, Inv. No. 337-TA-833* (Apr. 3, 2014), *Comm’n Op.* at 39).

250. *Id.*

251. *Id.* at 1291–92.

252. *Id.* at 1293.

253. *Id.*

254. *Id.* at 1299, 1302.

255. *Id.* at 1302. The petitioners have filed for a rehearing en banc in this case. *Rehearing En Banc Sought in Clear Correct Case*, BRINKS, GILSON, & LIONE (Feb. 12, 2016), <http://www.brinksgilson.com/rehearing-en-banc-sought-in-clear-correct-case>.

256. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 883 (Fed. Cir. 2015).

257. *Id.* (citing 19 U.S.C. § 1337(a)(3) (2012)).

258. 786 F.3d 879, 879 (Fed. Cir. 2015).

generally interpreted the “significant” or “substantial” requirements of this section to speak to the overall quantitative amount expended.²⁵⁹ In *Lelo*, the Federal Circuit disagreed with a qualitative assessment.²⁶⁰

In *Lelo*, a Canadian company (Standard Innovation Corporation) that sourced its parts and components for its kinesiotherapy devices from the United States and other countries, completed assembly of its products in China, and ultimately sold the products as off-the-shelf goods in the United States. *Lelo* is a California corporation that imports kinesiotherapy devices into the United States. Standard brought an infringement claim under section 337 against *Lelo*, claiming a violation of its patent on the devices. To establish a domestic industry argument, Standard claimed a significant qualitative investment in labor and equipment in the United States, as required by section 337.²⁶¹

The ITC concluded that the quantitative investment in domestic industry was modest, which the Federal Circuit interpreted as insignificant.²⁶² Yet, the ITC argued that the qualitative factors, namely the importance of the goods to the manufacturing process, compensate for the low quantitative value.²⁶³ The Federal Circuit disagreed and held that “[q]ualitative factors cannot compensate for quantitative data that indicate insignificant investment and employment.”²⁶⁴ Accordingly, because qualitative factors alone cannot sustain a section 337 case, the Federal Circuit reversed the ITC’s decision.²⁶⁵

CONCLUSION

The Federal Circuit had an active term in 2015, hearing cases on goods as diverse as curtain wall units, fingerprint machines, and metallic yarn, and legal challenges from induced patent infringement to reclassification to countervailing duties levied upon non-market economies. In all of the cases, the court provided its usual thorough and straightforward analysis, invoking *Chevron* deference in a majority of cases and leaving much of the substantive decision making to the ITC and Commerce, where these cases began.

259. *Id.* at 883–84.

260. *Id.* at 883.

261. 19 U.S.C. § 337(a)(3)(A).

262. *Lelo*, 786 F.3d at 885.

263. *Id.*

264. *Id.*

265. *Id.*
